No. 15203

In the United States Court of Appeals for the Ninth Circuit

CLIFFORD O. BOREN, APPELLANT

v.

R. A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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OPINION BELOW

The District Court's findings of fact and conclusions of law (R. 31–36) are not officially reported.

JURISDICTION

This appeal involves a deficiency in federal income taxes for the calendar year 1951 and 50% fraud penalty as determined by the Commissioner of Internal Revenue and assessed on July 22, 1955, against taxpayer in the respective sums of $6,490.77 and $3,245.39, together with statutory interest thereon in the sum of $1,305.62, aggregating $11,041.78. (R. 6, 32–33). The disputed assessment was made by the Commissioner more than 90 days after he had timely

mailed to the taxpayer on April 14, 1955, a statutory notice of deficiency from which the taxpayer, upon receipt thereof on April 15, 1955, filed no petition with the Tax Court for redetermination of the deficiency and the additions thereto. (R. 34.) Upon the delivery to the taxpayer by the Director of a written notice and demand for payment of the amount of the assessment, plus the statutory interest on November 22, 1955, and the issuing of a warrant for distraint on the same date (R. 33), the taxpayer, failing to make payment thereof, thereupon filed this action in the court below on December 15, 1955, under the provisions of 28 U. S. C., Section 1340, to restrain and enjoin the assessment and collection of the income tax, fraud penalty and statutory interest. (R. 3–9.) The Director thereupon filed motions to dismiss for lack of jurisdiction over the subject matter of the taxpayer's action under the provisions of Section 7421 (a) of the Internal Revenue Code of 1954 (R. 9–22), which the District Court, over the taxpayer's opposition (R. 22–23), granted on April 30, 1956. (R. 31–36.) Judgment was thereupon entered in favor of the Director, with costs, on May 10, 1956. (R. 36–37.) Within 60 days and on June 7, 1956, notice of appeal was filed by taxpayer. (R. 37.) Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

QUESTION PRESENTED

Whether the District Court erred in granting the Director's motion to dismiss and in holding that it did not have jurisdiction of this suit seeking to enjoin the Director from making any seizure, collection or dis-

traint of any of the taxpayer's property pursuant to the assessment of the deficiency in income tax, fraud penalty and statutory interest as determined and asserted by the Commissioner for the taxable year 1951.

STATUTES INVOLVED

These are printed in the Appendix, *infra.*

STATEMENT

The pertinent facts were found by the District Court substantially as follows (R. 32–34):

On or before March 15, 1952, the taxpayer filed a federal income tax return for the calendar year 1951. (R. 32.)

On March 11, 1955, the Commissioner sent the taxpayer a statutory notice of deficiency (so-called 90-day letter) by registered mail (R. 19–22) which recited that the taxpayer had deficiencies in income tax and fraud penalties in the respective sums of $6,490.77 and $3,245.39.[1] The latter amount is 50% of the deficiency in tax and represents a fraud penalty asserted by the Commissioner in accordance with the provisions of Section 293 (b) of the Internal Revenue Code of 1939. (R. 32–33.) The notice of defi-

[1] This notice of deficiency, as reprinted in the record (R. 19–22), bears the erroneous date of June 29, 1955, due to a mistake in printing. The official copy thereof in the Treasury Department files shows the correct mailing date of the deficiency notice to have been "MAR 11 1955," the date as alleged by the taxpayer (R. 4) and as found by the District Court. (R. 32–33.). Two other dates appearing on the original, made thereon by rubber stamp impressions for inter-office "Records" purposes of the Treasury Department, are "JUN 29 1955" and "JUL 11 1955," the former of which was mistakenly used by the printer in the record. (R. 19.)

ciency was returned to the Commissioner by the Post Office Department because the taxpayer had moved to a different address. At the time of the mailing thereof on March 11, 1955, to the taxpayer's old address, the Commissioner had actual notice and knowledge of the taxpayer's new address. (R. 33.)

On April 14, 1955, the Commissioner remailed the notice of deficiency by ordinary mail to the taxpayer's correct address. The taxpayer admits having received this notice of deficiency on April 15, 1955. (R. 33.)

On July 22, 1955, the Commissioner assessed deficiencies in income taxes and fraud penalties against the taxpayer in the respective sums of $6,490.77 and $3,245.39, as referred to in the above-mentioned notice of deficiency, together with statutory interest thereon in the total sum of $1,305.62. The total amount of the assessment was $11,041.78. (R. 33.)

On November 22, 1955, the Director, through his agent and representative, W. Howard Ferry, Jr., delivered to the taxpayer's attorney a notice and demand in writing that the taxpayer pay the amount of the above-mentioned assessment, and on the same date he issued a warrant of distraint concerning that assessment. (R. 33.)

The taxpayer is the owner of real and personal property, situated in the Sixth Internal Revenue Collection District of California, which is subject to distraint. The Director has threatened and is threatening to distrain, seize and sell the property of the taxpayer which may be found within that Collection District and to apply such property or the pro-

ceeds thereof to the payment of the assessments in question. Unless restrained and prohibited by the decree of the District Court, the Director will levy upon, seize and sell the taxpayer's property as well as all his other property which he may hereafter own or acquire within the above-mentioned collection district. (R. 34.)

The taxpayer did not file a petition for redetermination of the above-mentioned deficiencies in taxes and penalties with the Tax Court within 90 days after the mailing of the notice thereof by the Commissioner on April 14, 1955, nor had he done so up to the date the instant action was instituted. The taxpayer still has an opportunity to contest the controverted assessment of the deficiencies in tax, penalty and interest on the merits by paying the sums in question and administratively filing a claim for refund before pursuing his legal remedies in the Federal District Court or in the Court of Claims. (R. 34.)

Upon a consideration of the foregoing facts (R. 32–34) and/or allegations (R. 4–9), the District Court, pursuant to the Government's motion (R. 9–22), entered its judgment dismissing the taxpayer's suit for lack of jurisdiction on May 10, 1956 (R. 36–37). From the judgment so entered, the taxpayer appealed to this Court for review. (R. 37.)

SUMMARY OF ARGUMENT

The taxpayer's contention that the District Court had jurisdiction under 28 U. S. C., Section 1340, and therefore erred in granting the Government's motion

to dismiss his suit for injunctive relief, is without merit. The taxpayer has failed to show, in respect of the single position advanced below, that the District Court erred in holding that the Commissioner's assessment of the deficiencies in tax and fraud penalty made pursuant to the deficiency notice in question mailed to him at his last known business address was proper and timely under the pertinent statute. The taxpayer has also failed to show that the District Court erred in holding that the taxpayer, before bringing this action, had not pursued and exhausted his available administrative remedies for determination of the propriety of the deficiencies thus asserted against him and assessed by the Commissioner. As to the first proposition, the record shows that of all the documents filed by the taxpayer with the Commissioner during the entire period in question, the last one (power of attorney) showed his business address, to which the Commissioner mailed the disputed deficiency notice. Hence, this, without more, clearly shows that the deficiency notice in question was proper and timely under the pertinent statute, and therefore the Commissioner's assessment of the deficiencies in tax and fraud penalty was also timely and valid because made under the fraud—no limitation statute providing that assessments in fraud cases may be made at any time, without limitation.

The taxpayer upon appeal, however, has apparently abandoned the above mentioned position urging invalidity of the Commissioner's deficiency notice because it allegedly was not sent to his last known

address, and now for the first time adopts a new position urging invalidity of the notice of deficiency because sent to him by ordinary mail, instead of by registered mail. Since this issue was neither raised below nor considered by the District Court, this Court, under the authorities, is not called upon to consider it but is duty bound to pass it. In the event this Court should nevertheless decide to consider the newly-raised issue, however, we submit that there is no merit in the taxpayer's contentions advanced in respect thereto. This is shown by the fact that the statute, pursuant to which the disputed deficiency notice was sent out by the Commissioner, merely *authorized*—a permissive word at most—the Commissioner to send the notice of deficiency to the taxpayer at his last known address by registered mail, without specifying that it *must* be sent by such mail. This, of course, left the mode of serving the deficiency notice on the taxpayer within the Commissioner's discretion as to how and in what manner it should be done *effectively* according to the circumstances involved (that is, by registered mail, ordinary mail, manual delivery by revenue agents, etc.). The statute was so designed by Congress as to make sure that the taxpayer would certainly, if possible, receive the notice in timely fashion in order to have full opportunity to file a petition for redetermination of the deficiency, of which he is thus notified, with the Tax Court, if he so chooses. This is shown by the corresponding statute, first enacted by Congress upon establishing the Board of Tax Appeals in the 1924 Taxing Act, wherein it was

made mandatory that the Commissioner *must* send out notices of deficiencies by registered mail, service thereof upon the taxpayer in any event clearly being the criterion, as the legislative history of that statute shows.

The mandatory provision of the 1924 statute, however, was deleted and amended by the corresponding provision enacted in the 1926 taxing Act wherein Congress for the first time merely authorized—instead of required, as theretofore—the Commissioner thereafter to send out notices of deficiencies by registered mail. The legislative history thereof clearly indicates that service of the notice of deficiency on the taxpayer was there also the specified objective sought—even by other means if ineffective by registered mail, as had theretofore developed in many cases—to the end that the taxpayer would certainly receive the notice and be afforded the opportunity to appeal to the Tax Court (then the Board of Tax Appeals) for redetermination of the deficiency. Moreover, that the statutory authorization was so designed as to leave it within the discretion of the Commissioner as to what means of service should be used effectively to deliver the notice of deficiency to the taxpayer is shown by the decisions holding a deficiency notice valid and proper under the statute where it was first sent to the taxpayer by registered mail, returned to the sender by the postal authorities because acceptance thereof was refused by the taxpayer, and thereafter served upon the taxpayer, not by registered mail, but manually by a revenue agent in person. This, indeed, is comparable to the situation

in the instant case where the deficiency notice was held valid by the District Court where it was first sent to the taxpayer by the Commissioner by registered mail, returned to the Commissioner by the postal authorities, and thereafter remailed to the taxpayer by ordinary mail, which he admittedly received on the next day after the remailing. In both of these instances, registered mail proved ineffective and therefore the Commissioner was obliged, under his authorization, to serve the deficiency notices upon the respective taxpayers by other means which would be, and were, effective within the contemplation of the statute. From the foregoing, it is clear that the taxpayer, even by abandoning his previous untenable position below and adopting a new position equally untenable here, has nevertheless not been able to show that the disputed deficiency notice, remailed to him by ordinary mail and thereby effectively delivered to him, is in anywise defective.

As to the injunctive relief sought by the taxpayer, the District Court properly found and held that, contrary to the taxpayer's contentions, he is not entitled to such relief because he failed to pursue and exhaust his statutory administrative remedies available for the redetermination of the propriety of the deficiencies in tax and fraud penalty, as asserted and timely assessed against him by the Commissioner, together with statutory interest thereon. Moreover, the taxpayer has failed to show any extraordinary reason or condition as to why the injunctive relief sought by him should be granted. It follows, as the District correctly held, that in the light of the broad

and mandatory provisions of Section 7421 of the 1954 Code, the enforcement and collection of the deficiencies in question cannot be lawfully enjoined.

ARGUMENT

The District Court did not err in granting the Government's motion to dismiss for want of jurisdiction

The question presented here is whether the District Court erred in granting the Government's motion to dismiss and in holding that it did not have jurisdiction of this action, brought by the taxpayer under 28 U. S. C., Section 1340. In his complaint in this case, the taxpayer prayed that the Director be restrained and enjoined from making any seizure, collection or distraint of any of his property pursuant to the assessment of the deficiency in income tax, fraud penalty and statutory interest, as determined and asserted against him by the Commissioner in his statutory notice of deficiency sent him on April 14, 1955, for the taxable year 1951, under the provisions of Section 272 (a) (1) and (k), and assessed under Sections 276 (a) and 293 (b), all of the Internal Revenue Code of 1939. (Appendix, *infra.*) In the court below the taxpayer contended that the Commissioner's notice of deficiency remailed to him at his last known business address by ordinary mail on April 14, 1955, instead of at his new residence, was an improper notice under the pertinent statute and therefore the assessment made by the Commissioner on July 22, 1955, was untimely and unlawful. The District Court rejected this contention and also denied the taxpayer's prayer for injunctive relief, and we submit properly so.

The tapayer furnishes no argument in his brief in this Court in respect of the sole contention made below—alleged invalidity of the Commissioner's deficiency notice because it was purportedly not mailed to him at his last known address; hence, it is assumed that he has now abandoned this contention upon appeal. However, since that contention was made with respect to the same statute (Section 272 (a) (1) and (k) of the 1939 Code)[2] as is the contention he is now making for the first time on appeal (R. 71; Br. 5–13)—alleged invalidity of the deficiency notice because sent to him *by ordinary mail,* instead of by registered letter—and both issues have a collateral bearing on each other, we treat first the former contention urged below, to the extent considered necessary and helpful here, even though apparently abandoned.

A. The Commissioner's notice of deficiency remailed to the taxpayer at his last known address by ordinary mail on April 14, 1955, was a valid, effectively-mailed statutory notice of deficiency, and therefore the assessment in question was timely

The taxpayer concedes (Br. 4), as he did below (R. 4, 5), that the Commissioner's first deficiency

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[2] Actually the taxpayer cites and relies in this connection on Section 6212 (a) and (b) (1) of the 1954 Code, (Appendix, *infra*) (Br. 6, 10, 15), as he did in the court below (R. 4, 23). That section, however, applies only to taxes imposed by the 1954 Code for taxable years beginning after December 31, 1953. (See Section 7851 (a) (1) (A) and (6) of the 1954 Code.) Corresponding thereto is Section 272 (a) (1) and (k) of the 1939 Code which is the law applicable to the taxable year 1951 here involved. (Br. 6; R. 71.) However, as the taxpayer states (Br. 6), the provisions of both Sections 272 of the 1939 Code and Section 6212 of the 1954 Code are substantially the same.

notice mailed to him by registered letter on March 11, 1955, to his former residential address (4511 Utah Street) and returned to the sender by the Post Office Department, was remailed to him by that official by regular mail at his last known business address (4965 El Cajon Boulevard) on April 14, 1955, and was received by him on the next day, as the District Court found (R. 32–33). The taxpayer's sole contention below was that he is entitled to injunctive relief on the ground that the assessment in question is void because the Commissioner's deficiency notice remailed to him at his business address—instead of at his new residence (6244 Perique Street)—on April 14, 1955, and admittedly received by him on the next day, was not mailed to him at his last known address, as required by Section 6212 (b) of the 1954 Code.[3] (R. 4–5, 8–9, 22–23.) The District Court, as pointed out, rejected this contention, and found and held upon the record that the Commissioner's deficiency notice remailed by ordinary mail to the taxpayer at his last known business address on April 14, 1955, and received by him on the next day was a proper *statutory* notice of deficiency, timely given under the pertinent statute because fraud was alleged therein under Section 293 (b), and hence the deficiency assessment was not barred by the ordinary three-year statute of limitations (Section 275 (a) (Appendix, *infra*)[4] but was

[3] This should be, correctly, Section 272 (a) (1) and (k) of the 1939 Code. (See footnote 2, *supra*.)

[4] Section 6501 (a) of the 1954 Code, erroneously referred to by the taxpayer in the complaint as prohibiting the assessment here in question (R. 4, par. IV), does not apply to the tax, penalty and

timely made under Section 276 (a) of the 1939 Code. (R. 33, 35.)

The pertinent statute provides that if the Commissioner determines that there is a deficiency in respect of the income tax for the taxable year involved, then he "is *authorized* to send notice of such deficiency to the taxpayer by registered mail," and that such notice shall be sufficient for purposes of the statute "if mailed to the taxpayer at his last known address." [Italics supplied.] Section 272 (a) (1) and (k) of the 1939 Code. The taxpayer alleged in his complaint in the District Court that he had several other later addresses as listed therein, all of which the Commissioner, before mailing the deficiency notice to his business address, had been put on notice and had actual knowledge of by virtue of the various documents he had filed with that official but that the Commissioner nevertheless improperly sent the deficiency notice to his business address. (R. 4–7). Hence, he urged below that the deficiency notice, though received by him, was defective because it "was not mailed to the taxpayer at his last known address" as required by the statute, and therefore injunction should lie. (R. 22–23.) These allegations and contentions, however, are not supported by the record. The record shows, rather, that the taxpayer had filed with the

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interest as assessed by the Commissioner for the taxable year 1951, all of which were imposed by the 1939 Code. See Section 7851 (a) (1) (A) and (6) of the 1954 Code. Section 275(a) of the 1939 Code (Appendix, *infra*) corresponds to Section 6501 (a) of the 1954 Code, as pointed out by the Director in the court below. (R. 14.)

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Commissioner from time to time a number of documents—his income tax return for 1952 filed on or before March 15, 1953; his 1953 return, together with his declaration of estimated tax for 1954, both filed on or before March 15, 1954, his power of attorney executed and filed with the Commissioner on or about May 11, 1954, etc.—showing his several successive residential addresses and also his business address (all in San Diego, California), of which, he alleged, his residential address has been "6244 Perique Street" since April 11, 1952, and his business address has been "4965 El Cajon Boulevard" since March 9, 1951. (R. 5–7.) Of all these documents, however, it will be noted that the last one filed with the Commissioner was the taxpayer's power of attorney lodged with that official on or about May 11, 1954, giving only his business address above mentioned, the receipt of which was acknowledged by the Commissioner on September 29, 1954. (R. 6.) Hence, that business address was the latest and last address of the taxpayer of which the Commissioner had notice and knowledge at the time of his mailing the deficiency notice on April 14, 1955 (R. 5–7), and therefore the notice was proper and correct under the terms of the statute and the decisions cited hereinafter.

Any other conclusion would result in the Commissioner's being faced with a task of such magnitude as to be impossible of execution, clearly one never contemplated or intended by Congress other than to facilitate and insure actual delivery to taxpayers of the Commissioner's notices of deficiencies. This is

shown quite plainly by the legislative history of Section 272 (k) of the Revenue Act of 1928, c. 852, 45 Stat. 791—identical with Section 272 (k) of the 1939 Code here involved—where Congress for the first time added the term "at his last known address" to the taxing statutes [5] for the reason that—

> It is obviously impossible for the Commissioner to keep an up-to-date record of taxpayers' addresses. Where a taxpayer has changed his address without notifying the Commissioner, it is not possible to be sure that the deficiency letter is being sent to his last address.[6]

It necessarily follows, we submit, that Congress may not be properly considered to have intended otherwise than that any deficiency notice sent out by the Commissioner to a taxpayer at his last known address to the extent knowable and/or ascertainable, and actually delivered to and received by the taxpayer, as here (R. 5, 33), by whatever method of servive used therein within his statutory authorization, "shall be sufficient" notice of a deficiency for the pur-

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[5] Report of the Committee on Ways and Means in respect of the addition of subsection (k) to Section 272 of the 1928 Act (H. Rep. No. 2, 70th Cong., 1st Sess., pp. 22–23 (1927) (1939–1 Cum. Bull. (Part 2) 384, 399); likewise, S. Rep. No. 960, 70th Cong., 1st Sess., p. 30 (1928) (1939–1 Cum. Bull. (Part 2) 409, 430).

[6] In this connection, the reports of the Commissioner of Internal Revenue for the seven fiscal years ended June 30, 1950–1956, show that there were filed by all taxpayers more than 360,040,000 tax returns of all kinds during the four fiscal years ended June 30, 1952–1955, the period during which the taxpayer's 1951 return was filed in 1952 until the instant action was filed on December 15, 1955. (R. 5, 9.)

poses of the statute (Section 272 (k), 1939 Code). Hence, it is clear that actual effective delivery to and service upon the taxpayer of the notice of deficiency was clearly the sole objective and intent of Congress in enacting Section 272 (a) (1) and (k), to the end that the taxpayer-recipient shall be put on notice and have sufficient time and opportunity to file a petition for redetermination of the deficiency with the Tax Court if he chooses. *Dolezilek* v. *Commissioner,* 212 F. 2d 458 (C. A. D. C.). Whether or not the taxpayer, upon actual receipt of the deficiency notice, however, chooses to exercise his statutory right of appeal to the Tax Court, we submit, is clearly immaterial.

In these circumstances, it is clear that the taxpayer, by his own allegations in his complaint below, established the fact that the Commissioner's deficiency notice in question constituted a valid and effectively served statutory notice of deficiency within the meaning of the statute, as the District Court correctly held. (R. 33, 35.) The Commissioner's deficiency notice sent to the last known business address given on the taxpayer's power of attorney was sufficient. *Parker* v. *Commissioner,* 12 T. C. 1079, 1081–1083. Moreover, it has been held that the Commissioner's mailing of the deficiency notice even to the usual business address of the taxpayer is a sufficient compliance with the statute, in order to warrant his making the assessment involved. *United States* v. *National City Bank of New York,* 32 F. Supp. 890, 892 (S. D. N. Y.); compare *Dolezilek* v. *Commissioner,* 212 F. 2d 458, 459–460, 462 (C. A. D. C.); *Eppler* v. *Commissioner,* 188

F. 2d 95, 97 (C. A. 7th); *Commissioner* v. *Stewart,* 186 F. 2d 239, 241 (C. A. 6th); *Commissioner* v. *Rosenheim,* 132 F. 2d 677 (C. A. 3d); *Clark's Estate* v. *Commissioner,* 10 T. C. 1107, affirmed, 173 F. 2d 13 (C. A. 2d); *Whitmer* v. *Lucas* (N. D. Ill.), decided April 28, 1931 (15 A. F. T. R. 643), affirmed, 53 F. 2d 1006 (C. A. 7th), certiorari granted and proceeding vacated, with directions to District Court to dismiss, 285 U. S. 529.

Such cases as *Ventura Consolidated Oil Fields* v. *Rogan,* 86 F. 2d 149 (C. A. 9th), certiorari denied, 300 U. S. 672, and *Slaven* v. *United States* (S. D. Cal.), preliminary injunction granted October 21, 1952 (45 A. F. T. R. 1168), permanent injunction granted June 2, 1953 (45 A. F. T. R. 1256), for example, among others cited and relied on heavily by the taxpayer in the District Court (R. 22–23, 28–29), are distinguishable. The Government distinguished the *Ventura* case below on the ground that no 60-day statutory deficiency notice, as such, was ever mailed by the Commissioner to the taxpayer as then required by Section 274 (a) of the Revenue Act of 1924. Likewise, in the *Slaven* case, the Commissioner sent the 90-day deficiency notice by registered mail to the taxpayer's previous address and not to her last known address of which he had actual notice, and there was no subsequent remailing or effective delivery of the notice to the taxpayer, as here.

The foregoing, we submit, discloses the necessity for the taxpayer's now abandoning his sole untenable original contention urged, relied on by him, and considered by the court below. and adopting a new

whereas no prejudice would be suffered by requiring that a new notice of deficiency be sent by the Commissioner in the manner authorized by the statute. (Br. 9–13.) The taxpayer relies on the provisions of the first sentence of Section 272 (a) (1) of the 1939 code,[8] heretofore quoted in connection with the "last known address" argument, *supra,* namely, that the Commissioner, upon determining a deficiency for the taxable year, "is authorized to send notice of such deficiency to the taxpayer by registered mail." On the basis of this statutory authorization, the taxpayer insists that it is mandatory for the Commissioner to give notice of the deficiency by registered mail only. (Br. 6.)

We submit that the word "authorized" as used by Congress in Section 272 (a) (1) of the 1939 Code is a permissive word at most, that is, it plainly gives the Commissioner leave to exercise the right thus afforded him by the statutory authorization, to the end that if he chooses to use the registered-mail method of sending the notice of deficiency, he is thereby reasonably certain of its delivery to and service upon the taxpayer. From the earliest time when the initial forerunner of this section was first enacted by Congress in Section 274 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, the legislative history thereof shows that the effective delivery to and service on the taxpayer of the Commissioner's statutory notice of his final determination of deficiency constitutes the real criteria and the end result designed to be

[8] See footnote 2, *supra.*

effected thereby. It clearly shows that the sole purpose of the statute was to make sure that the taxpayer would certainly be notified of the deficiency thus determined and asserted by the Commissioner in order that he would, in turn, be given full opportunity timely to exercise his statutory right of petitioning the Tax Court, within the period allowed therefor as set forth in the notice, for a redetermination of the deficiency, if he chose. This is part and parcel of the same purpose which impelled Congress to modify the taxing statutes, beginning with the 1928 Act (Section 272 (k)), authorizing the Commissioner to send the deficiency notice by registered mail to the taxpayer at his last known address, as already shown.

The use of the word "authorized"—instead of directive terminology—in the statute (Section 272 (a) (1)) by Congress, as shown by the legislative history thereof, clearly may not properly be construed to mean, nor does the statute specify or require, that the Commissioner, upon determining a deficiency, *must* serve the notice thereof on the taxpayer solely by registered mail. It is plain, moreover, that the authorization thus given the Commissioner in the statute does not in anywise *limit* his right of mailing deficiency notices to a particular mode (registered mail), to the exclusion of any other mode deemed feasible by the Commissioner (ordinary mail, manual delivery by revenue agent personally, etc.), at the expense thereby of invalidating the deficiency notice, as the Board of Tax Appeals, in construing Section 272 (a) of the Revenue Act of 1936, c. 690, 49 Stat.

1648, improperly held in *John A. Gebelein, Inc.* v. *Commissioner,* 37 B. T. A. 605, 606.[9] On the contrary, it is clear that by no possible construction, definition or connotation of the word "authorized,"[10] can it properly be said to "limit"[10] the Commissioner's right thus given him by the statute to a particular mode of serving the deficiency notice on the taxpayer. The Commissioner, by the permissive terms of Section 272 (a), is plainly not confined or restricted to the use of registered mail in sending out the notice of deficiency but rather, by clear implication, he is thereby clothed with the legal authority, power and right to use any other method, not expressly excepted or prohibited by the terms of the statute, *effectively* to serve the deficiency notice on the taxpayer. *Dolezilek* v. *Commissioner,* 212 F. 2d 458, 459–460, 462 (C. A. D. C.) (deficiency notice sent first by registered mail, refused by addressee and returned to sender by postal authorities, and redelivered manually to tax-

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[9] This erroneous construction in the *Gebelein* case, cited and relied on by the taxpayer (Br. 7), was followed by the Board (later the Tax Court) in subsequent cases, such as *Day* v. *Commissioner*, 12 B. T. A. 161, 163; *Block* v. *Commissioner*, 2 T. C. 761, 762; *Midtown Catering Co.* v. *Commissioner*, 13 T. C. 92, 95; *Hamilton* v. *Commissioner*, 13 T. C. 747, 749, all of which are cited and relied on by the taxpayer here (Br. 7–8).

[10] Webster's New International Dictionary (2d ed., 1949), defines these words as follows (pp. 186, 1434):

Authorize: 1. To clothe with authority, or legal power; to give a right to act; 2. * * *. b To give authoritative permission to or for; to empower; warrant * * *.

Limit: 1. To assign to or within certain limits; to fix, constitute, or appoint definitely; to allot * * *. 2. To apply a limit to, or set a limitation or bounds.

payer by revenue agent in person). Nor is there any basis or authority, other than its own, for the Tax Court's construction thereof (Br. 8) in *Hamilton* v. *Commissioner,* 13 T. C. 747, 749, where—though conceding that the initial provisions of Section 272 (a) of the 1939 Code which "authorized" the Commissioner's sending the deficiency notice by registered mail "by terms * * * appears to be permissive"—it nevertheless held that the provisions of that section which follow purportedly "indicate that such procedure is mandatory, if the tax is to be finally determined and collected." That this does not follow at all is clearly shown by the remaining provisions of Section 272 which fail to disclose, as pointed out, anything remotely indicating, much less showing, that the registered mail procedure, as "authorized" by Congress therein, was intended to be exclusive and therefore mandatory. On the contrary, this conclusion of the Tax Court certainly cannot be correct, indeed it would defeat the purpose of the statute, "if [thereby] the tax is to be finally determined and collected," as the Tax Court put it (p. 749). This is clearly shown by *Dolezilek* v. *Commissioner, supra,* where the registered mail method—registered deficiency notice refused by taxpayer upon receipt, returned to sender, and re-served on her by the revenue agent personally—proved to be wholly insufficient and ineffective for the collection of the tax as finally determined and asserted by the Commissioner there. The fallacy of the Tax Court's above-mentioned decisions in this respect is shown very clearly by the legislative history

of the corresponding provisions of earlier statutes, forerunners of Section 272 (a) (1) of the 1939 Code, dealt with below.

The first statute corresponding to Section 272 (a) (1) of the 1939 Code was enacted as Section 274 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, wherein Congress, upon establishing the Board of Tax Appeals by Section 900 of that Act, provided in Section 274 (a) that if the Commissioner determined that there was a deficiency in tax for any taxable year, then "the taxpayer * * * *shall be* notified of such deficiency by registered mail", from which the taxpayer, in turn, was entitled to file an appeal with the Board within 60 days after such notice was mailed by the Commissioner. [Italics supplied.] Likewise, Section 279 (b) of the 1924 Act provided that if the taxpayer filed a claim in abatement of a jeopardy assessment made by the Commissioner, then the Commissioner, upon receipt of the claim from the Collector, "*shall* by registered mail notify the taxpayer of his decision on the claim," within 60 days after the mailing of which the taxpayer could appeal therefrom to the Board. (Italics supplied.) Thus, those initial provisions of the 1924 Act, specifying the particular mode in which the Commissioner *shall* send out his notices of deficiencies, appear clearly to have included the negation of any other mode, and consequently the registered-mail method was mandatory under that Act.[11] *Botany*

[11] The legislative history of Sections 274 (a) and 279 (b) of the 1924 Act indicates nothing to the contrary. H. Rep. No. 179, 68th Cong., 1st Sess. pp. 62, 64 (1924) (1939–1 Cum. Bull. (Part 2) 241, 258, 260); S. Rep. No. 398, 68th Cong., 1st Sess. pp. 30–31, 32–33 (1924) (1939–1 Cum. Bull. (Part 2) 266, 287, 289).

Mills v. *United States,* 278 U. S. 282, 289. By the specific terms of the statute, the Commissioner could then send out his deficiency notices by registered mail *only.* The Third Circuit so held in *Heinemann Chemical Co.* v. *Heiner,* 92 F. 2d 344, 346–347, in respect of the Commissioner's action there on the taxpayer's abatement claim under Section 279 (b) of the 1924 Act which, as shown, used substantially the same language as Section 274 (a) in respect of the Commissioner's sending out notices of deficiencies.

These mandatory provisions as appearing in the 1924 Act, however, were specifically deleted, modified and liberalized for later years, beginning with Section 274 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9. That section provided specifically that the Commissioner, upon determining a deficiency, "is *authorized* to send notice of such deficiency to the taxpayer by registered mail,"[12] from which the taxpayer could appeal to the Board of Tax Appeals within 60 days after such mailing. [Italics supplied.] The legislative history of this enactment of Section 274 (a) shows very clearly, in respect of the requisite procedure thereafter to be followed in the case of the determination and assertion of a deficiency in tax, that "the commissioner can take no action to assess and collect a deficiency [unless and] until he has

[12] The same provisions have been continued in the successive Revenue Acts up to the present time. Section 272 (a) of the Revenue Acts of 1928, c. 852, 45 Stat. 791; 1932, c. 209, 47 Stat. 169; 1934, c. 277, 48 Stat. 680; 1936, c. 690, 49 Stat. 1648; 1938, c. 289, 52 Stat. 447; Internal Revenue Code of 1939 (Appendix, *infra*); and Sec. 6212 (a) of the Internal Revenue Code of 1954 (Appendix, *infra*).

mailed to the taxpayer a notice of the deficiency * * *," as authorized by the newly-worded law.[13] Thus, beginning with the 1926 Act, the statute, as changed—instead of *requiring* the Commissioner to send out deficiency notices by registered mail, as theretofore under the 1924 Act—thereafter *authorized* the Commissioner, liberally and broadly in his discretion, to send out and serve on taxpayers his notices of deficiencies, either by registered mail or by any other *effective* means (ordinary mail, manual delivery, etc.) as deemed best by him to be most practicable and/or feasible under the circumstances of each case. This, as already pointed out, was designed to make reasonably certain that *in any event* the taxpayer in each case would surely receive the notice of deficiency in order to afford him timely and full opportunity to perfect and file a petition for the redetermination thereof with the Board of Tax Appeals (now the Tax Court), if he chose to do so. *Dolezilek* v. *Commissioner,* 212 F. 2d 458, 459–460, 462 (C. A. D. C.).

If the foregoing were not true, there could have been no possible reason, necessity or occasion—and the taxpayer shows none—for the newly-adopted permissive provision enacted by Congress by the specific different wording used in Section 274 (a) of

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[13] S. Rep. No. 52, 69th Cong., 1st Sess., pp. 26–27 (1926) (1939–1 Cum. Bull. (Part 2) 332, 352) and H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 39 (1926) (1939–1 Cum. Bull. (Part 2) 361, 368), rewriting Section 274 (a) of the House bill (H. Rep. No. 1, 69th Cong., 1st Sess., pp. 10–11 (1925) (1939–1 Cum. Bull. (Part 2) 315, 321–322)), to conform to the Senate amendment thereto, *supra.*

the 1926 Act. Indeed, this amendment must necessarily have been designed to forestall the failure of effective service upon and delivery to taxpayers of deficiency notices because of unforeseeable circumstances by registered mail, as shown by the decision in *Dolezilek* v. *Commissioner, supra,* where delivery of the Commissioner's deficiency notice sent by registered mail was prevented—as indeed in many cases—by circumstances unforeseen and only the ultimate manual delivery thereof by a revenue agent proved effective. The situation in the *Dolezilek* case, is, indeed, comparable to the situation in the instant case where the deficiency notice was held valid by the District Court where it was first sent to the taxpayer by the Commissioner by registered mail, returned to the Commissioner by the postal authorities, and thereafter remailed to the taxpayer by ordinary mail, which he admittedly received on the next day after the remailing. In both of these instances, registered mail proved ineffective and therefore the Commissioner was obliged, under his statutory authorization, to serve the deficiency notices upon the respective taxpayers by other means which would be, *and were,* effective within the contemplation of the statute. Nor did the taxpayer contend to the contrary in the District Court, never once objecting below to the validity of the Commissioner's notice of deficiency in question which, after being mailed to him first by registered letter and returned (undelivered) by the postal authorities, was remailed to him by ordinary mail on April 14, 1955, and never once contending that the latter notice was

defective on the ground that it could properly have been sent to him by the Commissioner *only* by registered mail, as here contended for the first time. (R. 4–9, 23; Br. 5–9.) In any event, the facts heretofore disclosed (footnote 7, *supra*) fully support, indeed compel, the inference and conclusion that the taxpayer actually received the first deficiency notice sent him by the Commissioner by registered mail on March 11, 1955—not denied by the taxpayer, as pointed out—which, upon being returned to the sender by the postal authorities, the Commissioner remailed to him by ordinary mail on April 14, 1955, which he admittedly received on the next day.[14] Hence, that was clearly sufficient to meet the requirements of Section 272 (a) (1) of the statute. *Dolezilek* v. *Commissioner, supra;* compare *Commissioner* v. *Rosenheim,* 132 F. 2d 677 (C. A. 3d); *Clark's Estate* v. *Commissioner,* 173 F. 2d 13 (C. A. 2d); *Commissioner* v. *Stewart,* 186 F. 2d 239 (C. A. 6th).

Dolezilek v. *Commissioner,* 212 F. 2d 458, 459–460 (C. A. D. C.), cited but not distinguished by the taxpayer (Br. 9), is a case squarely in point. There the Commissioner on March 11, 1952, sent the taxpayer by registered mail a properly addressed statutory 90-day notice of deficiency covering years 1946–1950, as authorized by Section 272 (a) (1) and (k) of the

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[14] Hence, contrary to his contention (Br. 11–12, 14), the taxpayer very clearly was not deprived of his right of timely petitioning the Tax Court for a redetermination of the Commissioner's final determination of deficiency in tax and penalty, as disclosed by the Commissioner in the notice of deficiency finally and *effectively* delivered to the taxpayer. He merely never exercised that right (R. 33–34).

1939 Code, which was returned to the sender by the postal authorities stamped "Not claimed—Refused". The deputy collector thereupon personally served the deficiency notice on the taxpayer on April 25, 1952; that is, 45 days after it had been mailed to her. She thereafter filed with the Tax Court a petition for redetermination of the deficiency asserted therein, more than 90 days after the notice was originally mailed on March 11, 1952, but less than 90 days after manual delivery thereof by the deputy collector. In these circumstances, the Commissioner moved the Tax Court to dismiss the case for lack of jurisdiction, urging the expiration of the 90-day period of limitations for appeal, and the Tax Court, granting the motion, entered an order of dismissal accordingly, from which the taxpayer appealed. The appellate court, rejecting the taxpayer's claim that she had been misled by the manual delivery of the deficiency notice and believed that she had 90 days from the date of such delivery in which to appeal to the Tax Court, held that the 90-day statutory period for filing the petition for redetermination with the Tax Court was properly computed from the date of mailing the first notice, rather than from the date of the subsequent personal service thereof on the taxpayer by the deputy collector. The court stated (pp. 459–460):

> The statute flatly says that a petition may be filed with the Tax Court within ninety days "after such notice is mailed." It makes no provision for manual delivery or for the computation of the ninety-day period from the date of such delivery. It specifically provides that

> "notice of a deficiency in respect of a tax imposed by this chapter, if mailed to the taxpayer at his last known address, shall be sufficient for the purposes of this chapter * * *." Petitioner had, we think, no cause for confusion. Moreover, after her receipt of actual notice she could have made a timely filing in the Tax Court: some forty-five of the ninety days were left, and there is no suggestion that this was not ample.
>
> We hold, therefore, that where a taxpayer receives actual notice of deficiency during the ninety-day period, and has adequate time remaining within that period for preparing and filing his petition, he is not entitled to compute the period from a date other than that of mailing. We need not say what result would follow if actual notice is never received, or where the time remaining is inadequate. We decide only the present case. And we note that our holding here does not leave petitioner without remedy. A taxpayer, after a deficiency has been collected, can claim a refund of the amount collected and if necessary can file suit on the refund claim.

The dissenting Judge (Miller), though disagreeing with the majority in that he felt that the taxpayer should have had 90 days in any event, not after the mailing of the deficiency notice as the statute provides but after the actual delivery of the document to her, within which to file the petition for redetermination with the Tax Court, nevertheless cast further light on the problem of statutory notices of deficiencies by pointing out, in agreement with the majority, that (p. 462):

> Section 272 does not, as the majority say, provide for manual delivery. But such delivery is not forbidden, and the use of registered mail is not made exclusive. The essential thing is that the taxpayer have notice, and not that he have it in any particular way.

Finally, it will be noted that this Court and other circuits have held that where an incorrectly addressed deficiency notice is mailed by the Commissioner by registered letter, received by the taxpayer and used by him as a basis for filing a timely petition with the Tax Court, such notice is a sufficient compliance with the statute, any defects in the address being considered as waived by the filing of the petition. *McCarthy Co.* v. *Commissioner,* 80 F. 2d 618 (C. A. 9th), certiorari denied, 296 U. S. 655; *Kay Mfg. Co.* v. *Commissioner,* 18 B. T. A. 753, affirmed, 53 F. 2d 1083 (C. A. 2d); *Wright* v. *Commissioner,* 34 B. T. A. 84, affirmed, 101 F. 2d 309 (C. A. 4th). In these circumstances, no valid reason appears as to why the same result should not obtain where the taxpayer actually receives and accepts the deficiency notice, even though allegedly sent him improperly by ordinary mail as here, whether or not he chooses to use it as a basis for filing a petition for redetermination with the Tax Court. In either case, the taxpayer's actual receipt of the deficiency notice *with the statutory right* to appeal therefrom to the Tax Court is clearly the test under the terms of the statute, as shown. As previously pointed out, moreover, whether or not he elects to exercise that right is plainly immaterial. So long as the taxpayer actually receives the deficiency notice,

whether sent to and served upon him by the Commissioner, under his statutory authorization provided in Section 272 (a) (1), by registered mail, or by ordinary mail, personal service by a revenue agent or otherwise if he so chooses, the statutory requirements and purpose have been clearly met, as heretofore shown. *Dolezilek* v. *Commissioner, supra* (pp. 459–460, 462).

Heinemann Chemical Co. v. *Heiner,* 92 F. 2d 344 (C. A. 3d), cited and relied on heavily by the taxpayer (Br. 8–9, 13), is clearly distinguishable. There, as pointed out, the Third Circuit held that Section 279 (b) of the 1924 Act requiring that the taxpayer "shall be" notified by registered mail in respect of the Commissioner's action taken on his abatement claim was mandatory. But, as also shown, that statute—and also Section 274 (a) of that Act containing the same registered-letter mailing requirement as to deficiency notices—was changed by the 1926 Act thereafter authorizing the Commissioner to send notices of deficiencies to taxpayers by registered mail and/or otherwise, within his discretion. *Dolezilek* v. *Commissioner, supra.* Nor, as heretofore shown (footnote 9, *supra*), do any of the decisions of the Board of Tax Appeals and the Tax Court, cited by the taxpayer (Br. 7–9), help his case.

The foregoing, we submit, fully supports our position that the statutory authorization contained in Section 272 (a) (1) of the 1939 Code, beginning with the 1926 Act and continuing up to the present time, is necessarily a permissive one purposely designed and enacted by Congress to permit the Commissioner, in his discretion, to send out and effectively serve upon

taxpayers his deficiency notices not only by registered mail but also by other means (ordinary mail, manual delivery, etc.) which may prove expedient, advisable and/or necessary according to the unforeseeable and unknowable circumstances with which that official, faced with the prodigious task of processing millions of tax returns as filed for each taxable year, is confronted in a very high percentage of such cases. Moreover, this, unquestionably, is a fair and reasonable interpretation in that giving effect thereto will anticipate and preclude many taxpayers' transparent attempts to circumvent the statute purely on technicalities, as here, to the detriment of the other taxpayers not so minded.

3. The taxpayer failed to pursue and exhaust his statutory administrative remedies for determination of the propriety of the deficiencies in tax and fraud penalty as asserted and assessed against him by the Commissioner, and therefore for this and other reasons he is not entitled to injunctive relief

The taxpayer contends that it was not necessary for him to have filed a petition with the Tax Court for redetermination of the deficiencies involved before seeking injunctive relief on the ground that the deficiency notice in question was not a notice of final determination of deficiency sent him by the Commissioner by registered mail as authorized by the statute, and since it was sent to him by ordinary mail it was allegedly ineffective for any purpose; hence, he asserts he has no administrative remedy to exhaust and that he is therefore granted the right by statute to seek injunctive relief. (Br. 13–14.) We have already shown that the Commissioner's statutory notice of deficiency and the assessment made pursuant thereto

were timely and proper under the applicable provisions of the statute. Hence, it is clear, that, contrary to the taxpayer's contentions, he is not entitled to injunctive relief for, among other reasons discussed below, he failed, as the District Court held (R. 35–36), first to pursue and exhaust his available statutory administrative remedies for determination of the propriety of the assessment in question.

Since, as shown, the assessment was timely and properly made by the Commissioner because the tax and penalty, stemming from the taxpayer's false and fraudulent tax return as alleged in the Commissioner's deficiency notice (R. 19–22, 35), could be assessed at any time under the provisions of Section 276 (a) of the 1939 Code, it follows that the taxpayer's suit to restrain the collection of the tax is barred by Section 7421 (a) of the Internal Revenue Code of 1954 (formerly Section 3653 (a) of the 1939 Code), which provides that "Except as provided in sections 6212 (a) and (c), and 6213 (a) [formerly Section 272 (a) (1) of the 1939 Code], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court". This enactment forbids, in sweeping language, the issuance of an injunction to restrain the collection of taxes under color of office and without arbitrary or capricious action, as is clearly the case here. *Graham* v. *duPont,* 262 U. S. 234; *Bailey* v. *George,* 259 U. S. 16; *Dodge* v. *Osborn,* 240 U. S. 118; *Cadwallader* v. *Sturgess,* 297 Fed. 73, 75–76 (C. A. 3d), certiorari denied, 265 U. S. 584.

An examination of the record readily discloses that the taxpayer did not allege in his complaint below

(R. 3–9) nor has he shown upon appeal here (R. 71–72; Br. 13–14), any facts or grounds in any wise sufficient to warrant the circumvention of the broad provisions of Section 7421 (a) which, with two exceptions, preclude any action to restrain the assessment or collection of any federal taxes. It is clear from what we have already said under subheading A of this brief, *supra,* that the taxpayer has failed to bring his case within either of the two exceptions specified in that subsection of the statute, that is, he has failed to show (a) that the Commissioner did not meet the requirements of the statutory authorization provided by Section 6212 (a) of the 1954 Code (Appendix, *infra*)[15]—derived from, and for present purposes identical in requirements with, Section 272 (a) (1) of the 1939 Code, previously discussed in detail under subdivision A of this brief, *supra*—in sending and serving upon the taxpayer at his last known address a timely statutory notice of deficiency, and (b) that he ever availed himself of his right, under Section 6213 (a) of that Code (Appendix, *infra*)—also derived from and for present purposes identical in requirements to Section 272 (a) (1) of the 1939 Code—of filing a petition for redetermination of the deficiencies in question within 90 days after the Commissioner sent him the statutory notice of such deficiencies on April 14, 1955, which, as shown he received on the next day. (R. 34.)

In these circumstances, it is clear that the Commissioner's assessment of deficiency in tax and fraud

[15] Subsection (c) of Section 6212 of that Code has no relevancy here.

penalty on July 22, 1955 (R. 33)—that is, several days after the expiration of the taxpayer's statutory 90-day appeal period of which he was apprised in the Commissioner's deficiency notice (R. 19–20)—was timely and proper for the reason that fraud was alleged and asserted by the Commissioner in that deficiency notice under Section 293 (b) of the 1939 Code (R. 35). In such event, the tax, fraud penalty and statutory interest could, as the District Court held (R. 35), be assessed "at any time" under Section 276 (a) of the 1939 Code, without regard to the regular 3-year statute of limitations otherwise applicable. Accordingly, it is also clear, as the District Court held (R. 34, 35–36), that the taxpayer failed to pursue and/or exhaust the statutory administrative remedies available to him, not only in the foregoing respect, but also by virtue of his failing to pay the deficiencies in question and thereupon maintaining an action so as to judicially determine their validity upon the basis of a claim for refund for recovery of the deficiencies after payment, either in the Federal District Court or in the Court of Claims, under 28 U. S. C., Section 1340. This, we submit, is fatal to the taxpayer's case. *Macauley* v. *Waterman S. S. Corp.,* 327 U. S. 540, 543–545; *United States* v. *Edward Valves, Inc.,* 207 F. 2d 329, 330–333 (C. A. 7th), certiorari denied, 347 U. S. 934, citing the *Macauley-Waterman S. S. Corp.* case, and also *Lichter* v. *United States,* 334 U. S. 742, as well as *Aircraft & Diesel Equip. Corp.* v. *Hirsch,* 331 U. S. 752. In the latter case, the Supreme Court appropriately stated (p. 767) that—

> The doctrine [of first resorting to administrative remedies], wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.

To the same effect, where injunctions against distraint were denied, see *Bashara* v. *Hopkins,* 295 Fed. 319, 321 (C. A. 5th), certiorari denied, 265 U. S. 584; *Seaman* v. *Bowers,* 297 Fed. 371, 375–376 (C. A. 2d), citing *Cadwallader* v. *Sturgess*, 297 Fed. 73 (C. A. 3d), certiorari denied, 265 U. S. 584, and *Sigman* v. *Reinecke,* 297 Fed. 1005 (C. A. 7th), certiorari denied, 264 U. S. 597; *Hernandez V. McGhee,* 294 Fed. 460, 466–467, following *Graham* v. *du Pont,* 262 U. S. 234. It follows, we submit, that the court below properly held that because the taxpayer had not pursued and exhausted his available administrative remedies as provided in the pertinent statutes, it was without jurisdiction of this action under Section 7421 (a) of the 1954 Code, and that taxpayer's suit must be dismissed with the denial of the injunctive relief prayed for by him. (R. 35–36.)

However, notwithstanding the broad provisions of Section 7421 (a) forbidding the issuance of injunctive restraint against assessment and collection of taxes, the courts will enjoin assessment and collection in order to protect the rights of taxpayers where their remedy at law to recover taxes illegally assessed or collected is inadequate, or where there exist extraor-

dinary or exceptional circumstances (irreparable damage) bringing the case within the realm of equitable jurisdiction. *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 110, rehearing denied, 297 U. S. 726; *Miller* v. *Nut Margarine Co.,* 284 U. S. 498; *Allen* v. *Regents,* 304 U. S. 439; *Berry* v. *Westover,* 70 F. Supp. 537 (S. D. Cal.); *Martin* v. *Andrews* (S. D. Cal.), decided May 13, 1955 (1955 P–H, par. 72,876), (1955 C. C. H., par. 9615); *Midwest Haulers, Inc.* v. *Brady,* 128 F. 2d 496 (C. A. 6th); *J. M. Hirst & Co.* v. *Gentsch,* 133 F. 2d 247 (C. A. 6th). The taxpayer's mere recitation, however, of such conclusions as alleged in his complaint, namely, "Immediate and irreparable injury, loss and damage will result to plaintiff if defendant should levy upon, seize and sell plaintiff's property" (R. 8), without any proof thereof—and there is none (Br. 13–14)—is clearly not sufficient to enable him to prevail here. *Berry* v. *Westover, supra; Martin* v. *Andrews, supra; Acklin* v. *Peoples Savings Assn.,* 293 Fed. 392 (N. D. Ohio); *Broadway Building Corp.* v. *Sugden,* 2 F. Supp. 837 (W. D. N. Y.). Accordingly, it is clear that the taxpayer has failed to allege any facts in the complaint (R. 3–9), or to show anything further here upon appeal, which would or could support an injunction based on the above-mentioned exceptions.

In these circumstances, we submit that the District Court properly dismissed the taxpayer's suit to restrain the Commissioner's assessment or collection of the tax, penalty and statutory interest in question and thereupon properly granted judgment for the

Government on the grounds that it lacked jurisdiction over the subject matter of the action, the suit being barred by section 7421 of the 1954 Code, and that the complaint failed to state a claim against the Director upon which relief could be granted.

CONCLUSION

The judgment of the District Court is correct, and should therefore be affirmed upon review by this Court.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1939:

SEC. 272 [as amended by Sec. 203, Act of December 29, 1945, c. 652, 59 Stat. 669]. PROCEDURE IN GENERAL.

(a) (1) *Petition to Board of Tax Appeals.*— If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the

joint notice must be sent by registered mail to each spouse at his last known address.

* * * * *

(k) *Address for Notice of Deficiency.*—In the absence of notice to the Commissioner under section 312 (a) of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by this chapter, if mailed to the taxpayer at his last known address, shall be sufficient for the purposes of this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(26 U. S. C. 1952 ed., Sec. 272.)

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(26 U. S. C. 1952 ed., Sec. 275.)

SEC. 276. SAME—EXCEPTIONS.

(a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(26 U. S. C. 1952 ed., Sec. 276.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so

assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).
(26 U. S. C. 1952 ed., Sec. 293.)

Internal Revenue Code of 1954:

SEC. 6212. NOTICE OF DEFICIENCY.

(a) *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail

(b) *Address for Notice of Deficiency.*—

(1) *Income and gift taxes.*—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 1 or 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of such chapter and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

* * * * *

(c) *Further Deficiency Letters Restricted.*—

(1) *General rule.*—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213 (a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, or of estate tax in respect of the taxable estate of the same decedent, except in the case of fraud, and except as provided in section 6214 (a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213 (b) (1) (relating to mathematical errors), or in section 6861 (c) (relating to the making of jeopardy assessments).

(26 U. S. C. 1952 ed., Supp. II, Sec. 6212.)

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 6213.)

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 7421.)

U. S. GOVERNMENT PRINTING OFFICE: 1956